IN THE

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 171.

THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Appellant*,

vs.

CHARLES A. ELDRIDGE.

Brief in Behalf of Appellant.

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WASHINGTON, D. C.

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GIBSON BROTHERS, PRINTERS.
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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Henry H. Dudley being seized in fee of lots 1, 2, 3, 4, and 20, in square 204, in the city of Washington, D. C., conveyed the same on the 17th of August, 1871, by deed of trust, to Joseph H. Blackfan, trustee, in trust, to secure his two notes of even date for the sum of $3,500 each and payable at one and two years to John C. Ten Eyck and Joseph H. Burr.

Dudley subsequently sold his equity of redemption, subject to the incumbrance, to John Van Riswick, who, on the 10th of November, 1871, sold it to George B. Coburn, subject to the incumbrance, and on the same day Coburn conveyed by deed of trust to William H. Ward, in trust to secure his three notes payable at one, two, and three years, to the order of Van Riswick, and each for the sum of $2,578.13.

On the 8th of February, 1872, Coburn sold and conveyed

the property to Mayhew, subject to the incumbrances upon it.

On the 26th of February, 1872, Mayhew subdivided the property according to the plat at page 38 of the Record. By this plat eight lots, running from east to west, were made to front on the west side of Fourteenth street west, and in their rear eight other lots, running from south to north, were made to front on U street, which bounded the property on the south. The Fourteenth-street lots will, for the sake of simplicity, hereinafter be designated as the front lots, and those on U street as the rear lots.

There were no improvements upon the property when Mayhew purchased, but in September, 1872, he had improved the front lots by the erection thereon of eight three-story brick dwelling-houses, with back-buildings attached.

These improvements were, however, in an unfinished state, and Mayhew, being desirous of raising money to complete them, and for other purposes, applied to J. G. Bigelow, who, as his agent, undertook to negotiate a loan for five years for $32,000.

The Connecticut General Life Insurance Company of Hartford, Conn., made the loan, and took as security eight deeds of trust, each on one of the front lots, with the improvements thereon, and each securing a note of Mayhew for $4,000, payable in five years and bearing interest at ten per cent., payable semi-annually. At the time of the loan the front lots with the improvements were appraised at $67,800. (R., 68.)

One of the conditions upon which the company agreed to make the loan was that it should be secured by first deeds of trust upon the front lots and improvements. In consequence it became necessary to discharge the front lots and improvements from the two deeds of trust first above mentioned—that is, the deeds of trust to Joseph H. Blackfan and William H. Ward. The first of these deeds of trust was discharged in

respect of the front lots and improvements by the payment by Mayhew of the note maturing one year after date. This left the note at two years unpaid and secured by a first deed of trust upon the rear lots. The note thus secured was purchased by the Arlington Fire Insurance Company.

The deed of trust to William H. Ward, as trustee, was made to secure, as already stated, three notes, each for $2,578.13, and payable at one, two, and three years to the order of John Van Riswick. Van Riswick had endorsed without recourse and delivered to Aistrop & Dudley the two notes payable at two and three years, but had continued to be the owner of the note payable at one year. The release of the front lots and improvements by Ward from the deed of trust to him will be found at pp. 77, 78 of the Record.

John Van Riswick and Aistrop & Dudley united with the trustee in the execution of that deed. (R., 78.) The note owned by Van Riswick was paid. Aistrop & Dudley joined in the deed of release in consideration that Mayhew would secure the debt represented by the other two notes, and other money due to them by him, by seven deeds of trust, each securing the sum of $1,000, and covering one of the front lots, and subsequent to those given to the Connecticut General Life Insurance Company. These seven deeds of trust were accordingly given. (R., 23, 92.) Thus Aistrop & Dudley, after uniting in the release of the front lots from the deed of trust to Ward, held as security for the debt represented by the two notes the deed of trust to Ward in respect of the rear lots, and also the further security afforded by the seven deeds of trust on seven of the front lots and improvements.

The above releases from Blackfan and Ward gave rise to the present controversy.

Charles A. Eldridge, the appellee, filed his bill in the court below on the 9th of August, 1875, claiming that on the 15th

of June, 1872, he loaned Aistrop & Dudley $4,000, for which the said firm gave its note at sixty days, and also delivered as collateral security the two notes endorsed by John Van Riswick without recourse, and secured by the deed of trust to William H. Ward; that the deed of trust hereinbefore mentioned as made to Joseph H. Blackfan, trustee, was in fact made to Joseph H. Black*ford*, trustee; and that the release by the former was invalid, or, if valid, that the Arlington Fire Insurance Company, having consented to the release of the front lots, part of its security, could not enforce as against the appellee its deed of trust in respect of the rear lots, but that Joseph H. Blackfan had, in pretended execution of the deed of trust, sold and conveyed the rear lots to the Arlington Insurance Company.

The evident scheme of the bill is that the appellee, holding as security the rear lots only, and the Arlington Fire Insurance Company holding as security both the front and rear lots, the latter was obliged to exhaust the property in which the appellee was not interested, and if it consented to the release of that property, could not resort to the security held by the appellee; or, in other words, that the Arlington Fire Insurance Company having two funds, and the appellee but one, the former was bound first to exhaust the fund in which the latter had no interest, and in failing to do so acted at its peril. (See the bill, R., pp. 1–5.) The appellant was not made a party to this bill.

Much evidence was taken, and it was shown that the first deed of trust was made to Joseph H. Blackfan, and not Joseph H. Black*ford*, as pretended, but that a mistake had been made in recording the deed in the name of Blackford instead of Blackfan, which mistake was corrected long before the filing of the bill.

The appellee having failed to maintain his pretended equity against the Arlington Fire Insurance Company then

amended his bill by making the appellant a defendant, and alleging that said company had actual and constructive notice, before taking the eight deeds of trust above mentioned, of the fact that the appellee had an interest in the deed of trust released by William H. Ward, as trustee. (R., 14, 15.) The date of this amendment, which is important, is August 22, 1876. The appellant answered the bill, under the oath of its president, emphatically denying notice, either actual or constructive. (R., 16–19.) No replication was filed by the appellee until the cause, after a decree in his favor in special term, was on hearing in general term on appeal. (R., 109.) Neither was any evidence taken on the part of appellee after the amendment making the appellee a defendant. The solicitor of the appellee gave notice, however, that he would produce for cross-examination the witnesses that had been examined in behalf of the appellee. Two of these witnesses were examined. (R., 41–51.) The evidence taken in behalf of the appellant consists of the deposition of Edward W. Parsons, the president of the company, which will be found R., 54–94.

The court in special term, on the 25th of July, 1877, decreed that the release of William H. Ward, trustee, was void as against the appellee, and further decreed the sale of a part of the property, viz., front lots No. 59, 60, 61, 63, 64, and 65, unless the debt of the appellee, $4,000, with interest from the 15th of June, 1872, should be paid on or before the first day of October, 1877. (R., 107–108.)

This decree, on appeal, was affirmed in general term, and from the decree in general term an appeal was prayed and allowed to this court. (R., 109.)

The front lots, with the improvements, conveyed by the eight deeds of trust were, except one, sold on the 26th of April, 1873, for default on the part of Mayhew, and purchased by, and conveyed to, J. G. Bigelow. (R., 18, 60, 82.)

Three of the lots thus purchased by Bigelow were sold on the 4th of February, 1874, under deeds of trust given by him, and were purchased by the appellant. (R., 18, 61, 86–90.) Three of the other four lots purchased by Bigelow were sold by decree of court, under the deeds of trust given by him, on the 15th of October, 1874, and were purchased by purchased by the appellant. (R., 18, 61, 90, 91.)

Assignment of Errors.

The court erred—

1. In holding that at or before the execution and delivery by Ward of the deed of release, either he or J. G. Bigelow had notice that Aistrop & Dudley were not the parties authorized to consent to such release.

2. In holding that either William H. Ward or J. G. Bigelow was the agent of the appellant, so as to bind the appellant by implied or constructive notice.

3. In holding that the equity of the appellant was not equal to that of the appellee, and that the appellant, having in addition to his equity obtained the legal title, had not a right superior to that of the appellee.

4. In holding that the release by a trustee in a deed of trust to secure the payment of a debt, the agent of the parties interested, is not conclusive in favor of a *bona fide* purchaser for value and without notice, but that such purchaser is bound to inquire whether every holder of an equitable interest under said deed has consented to such release.

5. In holding that in a bill which charges neither fraud nor collusion on the part of the trustee releasing such deed of trust, the failure of the appellee, a holder as collateral security only, to give notice of his equitable interest, did not in equity estop the appellee from setting up error of judgment on the part of the trustee.

6. In holding that the appellee, notwithstanding such failure

to give notice to the trustee or to the appellant, and delay and acquiescence on his part, until every remedy over in behalf of the appellant was barred, was then entitled to assert his equity.

7. In holding that in the absence of any evidence of the amount realized at the sale by Joseph H. Blackfan under the first deed of trust, the full amount of the appellee's debt could be thrown upon the appellant.

8. In holding that the deed of release by William H. Ward, trustee, was void as against the appellee.

9. In holding that the appellee was entitled to the decree passed in his favor.

Points and Authorities.

II.

We contend that the appellant paid the amount of the loan to Mayhew in good faith, relying upon the security given, and without notice, either actual or constructive, of any equity of the appellee; and, further, that in the same good faith, and with the same absence of notice, it subsequently drew to itself the legal title, and stands in the position most favored in equity of a *bona fide* purchaser for value without notice.

It is sought to deprive the appellant of this position by charging it, through Bigelow or Ward, as its agents, with notice of the appellee's equity, or with notice of such facts as made it a duty, equivalent to notice, to prosecute such inquiry as would have led to a discovery of that equity.

We deny that either Bigelow or Ward was, at the time of the transactions in question, the agent of the appellant, and that they, or either of them, had notice of the appellee's equity, or such knowledge as will charge the appellant with the consequence of notice.

1. *As to the question of Bigelow's agency.*

It is clear that there was no intention on the part of the appellant to establish the relation of principal and agent between itself and him until he was appointed its insurance agent on the 22d of November, 1872. His first introduction to its president, Mr. Parsons, was on the 23d or 24th of September, 1872, (R. 55,) and within about three weeks after that date the loan transaction was concluded. Mr. Parsons testifies that the company had no agent in Washington at the time; for that reason, it would seem, it was agreed that the papers should be left with Moses Kelly, cashier of the National Metropolitan Bank at Washington, and the money drawn by him. (R., 55, 59, 62.)

Bigelow, in his testimony-in-chief, taken before the appellant was a party to the suit, speaks in general terms of having been its agent in the fall of 1872, and of having made the loan to Mayhew, but upon cross-examination, when his attention was brought down to something like definite facts, he says (R., 42) that he first became agent of the appellant about the last of November or the first of December, 1872; that he applied for the loan as Mayhew's agent, acted as his agent until the transaction was concluded, and drew the drafts for the money as his agent. (See also Mr. Parson's testimony on this last point, R., 57.)

It is true that Mr. Parsons, during the transaction, relied to a certain extent upon the truth of Bigelow's statements, but did so, we claim, not in the relation of principal to agent, but as one man relies, and is often compelled to rely, upon another with whom he is dealing, and as he would probably have relied upon Mayhew himself had there been no intervention of Bigelow as his agent. If Bigelow had been regarded by the appellant as its agent, there would have been no reason for the arrangement by which Moses Kelly was to have acted as its safeguard in the drawing and disbursement

of the loan. The arrangement, for some reason, was not carried out, but the money was drawn through the *assistant* cashier of the National Metropolitan Bank. (R., 75–77.)

Mayhew furnished, in connection with the loan, some life insurance, for which policies were issued by the appellant. Bigelow requested to be allowed to deliver the policies, and to sign the receipts for the premiums, as agent, which request was granted. (R., 47, 59.) If he had been the agent of the appellant, even for the purpose of the loan, his right to sign the receipts would have followed, and he would not have deemed it necessary to make the request.

2. *As to the question of Ward's agency.*

One of the conditions of making the loan was that Mayhew should furnish, free of expense to the appellant, an abstract or certificate of title of the property, but not that such abstract or certificate should be made by Ward or by any person specified. The name of W. R. Woodward was mentioned to Mr. Parsons by Mr. Webster, president of the Orient Ins. Co., as a reliable examiner of titles, and from what Mr. Webster told him he expected that his certificate would be furnished by Mayhew, and Mr. Parsons concluded to accept it if it should be furnished. It happened that Mr. Woodward was absent from Washington at the time, and Mr. Ward's certificate was sent and accepted instead of Mr. Woodward's, Mr. Parsons having heard of Mr. Ward's standing as an examiner of titles. (Mr. Parsons' testimony, R., 59, 60, 62; Bigelow's testimony, 26, 43, 47.)

There was no privity of contract between the appellant and Ward. But, further than this, the examination of the title and making a certificate of the same had no connection with the procuring or making the release. In making that, Ward acted in an entirely different capacity, namely, as trustee under a trust in which the appellee claims that he was the *cestui que trust.* Now, notice to a trustee is notice

to the *cestui que trust.* (Myers *vs.* Ross, 3 Head's R., 60.) So that whatever notice Ward had in the matter of the release is imputable to the appellee rather than to the appellant.

3. *As to the question of notice to Bigelow.*

There is no allegation or claim of proof that either was guilty or had any notice of fraud in the procurement or making of the release, or had actual notice of the appellee's interest under the same.

Implied or constructive notice is the most that can be contended for, and that must come under the classification which Vice-Chancellor Wigram, in Jones *vs.* Smith, (1 Hare's R., 43) speaks of as "cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry from the very purpose of avoiding notice;" and in regard to which he further says: "How reluctantly the court has applied, and within what strict limits it has confined, this class of cases, I shall presently consider. The proposition of law upon which this class proceeds is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge, a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a *bona fide* purchaser without notice. This is clearly Sir Edward Sugden's opinion, (Vend. & Burch., vol. 3, pp.

471, 472, Ed. 10,) and with that sanction I have no hesitation in saying it is mine also."

This decision was, on appeal, affirmed by Lord Lyndhurst, (1 Phillips, 244,) who says: "I am not disposed to extend the doctrine of constructive notice, and in expressing this opinion I believe I act in conformity with the opinion frequently expressed by my immediate predecessor," (Lord Cottenham.)

Story in his Equity Jurisprudence, § 400 *a*, says on the same point: "Vague and indeterminate rumor, or suspicion, is quite too loose and inconvenient in practice to be admitted to be sufficient;" and adheres to the doctrine in his decision of McNeil *vs.* Magee, (6 Mason, 265.)

In Woodworth *vs.* Paige, (5 Ohio St., 70,) the court says: "If there be no fraudulent avoidance of knowledge, but merely a want of caution, it is a *bona fide* purchase."

Now, taking this as correct in respect of the kind of notice imputed to the alleged agent, what proof is there of such notice? Bigelow himself is the only witness from whom there comes a syllable of evidence, and we will try to collate from his deposition substantially all that he says on the subject. On p. 23 of Record he says:

"One of these notes" (secured by the deed of trust to Ward) "at the time of the release was still owned and held by John Van Riswick, which I paid off. The other two notes, payable in two and three years, I never saw. Aistrop & Dudley claimed to be the holders and owners of them. An arrangement was entered into between Aistrop & Dudley and Mayhew whereby Aistrop & Dudley were to consent to the release of this deed of trust as to lots 50 and 59 to 65, inclusive, and allow me to have the first incumbrance; then Mayhew was to give seven deeds of trust for $1,000 each on lots 59 to 65, inclusive, to secure his notes for like amount to Aistrop & Dudley, which seven notes were to embrace the amount and interest of the two notes, the security of which was released, and a balance that Aistrop & Dudley

claimed to be due from Mayhew on account of some business transactions between them. The arrangement was carried out, and my recollection is that I wrote the trust deeds in which Totten was named as trustee. The release of the Fourteenth-street lots by Ward was handed to me, I think, by Aistrop & Dudley. At all events, I never had any conversation with Ward in reference to the release."

On p. 25 of the Record he says:

"It" (the release) "was delivered to me on or about the first of October, 1872—the exact date I cannot give. My recollection is, it was brought to my office, 628 F street. It came from Aistrop & Dudley, but whether it was Aistrop or Dudley or Mayhew that delivered it to me I cannot remember. I was not present when it was executed by Mr. Ward. I know that Aistrop & Dudley had it for a little while in their office. Aistrop, and not Dudley, was the man of that firm who took the active part in negotiating the sale of this note to the Arlington Fire Insurance Company. Dudley, I understood at the time, procured the release from Ward, and, aside from this deed of trust from Coburn to Ward, and its release, Aistrop & Dudley had nothing to do with the loan to Mayhew."

On page 16 he says:

" I have a recollection now of having asked Dudley where
" the notes then were and whether he owned them. He said
" he was the owner, or that he and Aistrop owned them, and
" told me where they were, but I can't recall in whose pos-
" session they were, but it was not Kilbourn and Latta. I
" think they said Mr. Totten had them, but I would not swear
" to that, and he assured me the release would be all right.
" This was at the corner of Seventh street and Louisiana
" avenue, in front of his office."

This is his direct testimony, and on cross-examination he says (R., 43) that he thinks Van Riswick spoke of the two notes as being in the hands of Aistrop and Dudley, and that during the transaction, and until after all the money had been advanced on that loan, he did not know, or hear, that El-

dridge had any interest in the notes that were secured by the trust-deed to Ward, and (R., 45) that he first learned of his claim some time in the year 1875; that it never occurred to him that the release was not rightly and properly made, and that he had no suspicion of anything wrong about it. He says (R., 48) that while he was informed by Aistrop and Dudley that they owned the notes, he thinks they said that Col. Totten held them as their attorney, and subject to their order.

In answer to questions by Mr. Totten, as to whether he had any impression on his mind that there was any claim against the notes, he says that when he made inquiry of Dudley as to the possession of the notes he understood from him that the party who held them did so subject to his order, and that if the holder had any claim on them, he, Dudley, could satisfy it and would do so, and he, Dudley, made the remark that he would make it all right with Ward, the trustee.

And he adds: "It was that remark, perhaps, that led me to suspect that the party who held the notes might have had some claim upon them."

This is the utmost of the proof on the question of notice to Bigelow.

This is complainant's witness, and when he says "he had no doubt that Aistrop & Dudley were the owners of the notes;" that "it never occurred to him that the release, when it was delivered to him, was not all right and proper, and had no reason to suppose that the notes had not been properly produced, and no suspicion of anything wrong about it," can these assertions be discredited without destroying his whole testimony?

What reason was there for further inquiry after the release was made by Ward? The only occasion for inquiry was to learn if Aistrop & Dudley were in a situation to obtain the

release, so that Mayhew could give the required security for the loan. This led to his asking them about the ownership of the notes, and their reply was all that was needed to satisfy him upon that point, namely, that the notes were under their control, and there would, therefore, be no obstacle in having the property released by Ward.

What motive could he have in desiring a release to be fraudulently obtained? Certainly he could have had none as agent of the appellant, for it had nothing to gain, and might lose much, by such a procedure. And so far as he was personally concerned there is no evidence of any advantage that accrued to him by reason of the release's having been obtained without the payment of the notes held by the appellee.

This is the only evidence of notice in contradiction to the explicit denial of the sworn answer. It is a rule of equity too well known to warrant citation of authorities, that a defendant's denial of notice in his answer under oath must be overcome by more than the testimony of a single witness, and in Hine *vs.* Dodd, (2 Atkyn's R., 275,) where the proof of notice was the defendant's own admission of notice, proved by a witness, in contradiction to his sworn answer, the bill was dismissed by Lord Hardwicke.

See also McMechan *vs.* Griffing, 3 Pick., 149.

4. *As to the question of notice to Ward.*

On this point there is absolutely no proof. He says in his sworn answer (R., 12, 13) that the first information he had that he was trustee in the deed of trust in question was when he was applied to for the release, as therein stated. The appellee could, and as a prudent man should, have given him notice of his interest in the trust, and by that single act of duty would doubtless have prevented any loss to the appellant or himself, and it is by his laches alone that loss has occurred.

The naked fact that Ward made the release without requiring the production of the notes, and this is a fact drawn from his answer rather than from any proof in the case, is the sole ground upon which notice can be imputed to him. This was doubtless an error of judgment or an act of carelessness, but falls far short of proving notice. Besides, as we have already said, his act in relation to the release was not in the line of his employment as examiner of title, but was done in his capacity of trustee.

II.

The satisfaction of a mortgage by the mortgagee, and the release of a deed of trust in the nature of a mortgage by the trustee, and the record thereof, may be relied upon by a purchaser having no notice that the same was made through mistake or fraud.

The contrary doctrine would confuse and imperil our titles and securities. In this District the trust-deed is almost exclusively used in lieu of a mortgage. To hold that a purchaser may not rely upon the act of the trustee in giving a release, as he may upon that of the mortgagee in entering satisfaction of a mortgage of which no assignment has been recorded, but must investigate the particulars of each transaction outside of the record, would subvert the purpose for which such deed of trust was introduced, and bring an element of uncertainty into dealings in real estate that would render them among the most doubtful instead of the most stable and reliable of human transactions.

Scott *vs.* Burton, 2 Ashm., (Pa.,) 312.

Valle's Administratrix *vs.* Am. Iron Mountain Co., 27 Mo., 455.

Ely *vs.* Schofield, 35 Barb., 330.

Executors of Swartz *vs.* Leist, 13 Ohio St. R., 419.

Waters *vs.* Waters and Jones, 20 Iowa, 363.
Reese *vs.* Allen, 5 Gilm., 236.
Cassell *vs.* Ross, 33 Ill., 244.
Hamilton *vs.* Lubukee, 51 *Ib.*, 415.
Wilson *vs.* South Park Coms., 70 *Ib.*, 46.

In the case of Savage *vs.* Gregory, (32 Conn., 250,) a bill was brought to foreclose a mortgage by the assignee of the note secured. The mortgagee, after assigning the note, had received the legal title and conveyed it away. The court held that the purchaser took it discharged of the mortgage, and, referring to the equitable maxim that where there is equal equity the law will prevail, says: "This maxim is, in cases of this sort, entitled to peculiar force with us under a recording system founded upon the policy of having the true state of every title to real estate appear upon our records."

* * "It is a familiar law that a sale of real estate by a trustee to a *bona fide* purchaser, who has no notice of the trust, if made for a valuable consideration, will be good against the rights of the *cestui que trust.*" And in North *vs.* Belden, (13 Conn., 380,) the court says: "This policy has added greatly to the security of our land titles, and has prevented much litigation which would otherwise have arisen; and our courts have ever considered it their duty to give such a construction to our statutes as will continue this salutary protection."

Many of the best judges and lawyers have regretted that, since the establishment of our recording system, the record title is allowed to be impeached in equity by the doctrine of notice, and certainly the proof should be strong and clear to warrant the application of this doctrine.

III.

The counsel of the appellee placed considerable stress, at

the hearing below, and will doubtless do so here, upon the case of the Conn. Gen'l Life Ins. Co., appellant, *vs.* Bernard Burnstine, which was decided in this court at the October term, 1877.

The case has not been reported, but a reference to the record in this court shows that no real analogy exists between it and the present case; that, while there is a coincidence of parties, and the suit arose out of a wrongful release of a deed of trust, yet the facts and principles controlling the two cases are essentially different, a few of which we will notice.

1. The events which gave rise to that case took place in February, 1873, when J. G. Bigelow, through whom notice was imputed to the Insurance Company, was its regular agent by the written appointment set out in this record.

2. The note secured by the deed of trust was, according to Burnside's testimony, held by him as absolute owner since its date, being about a year prior to the release complained of.

3. Burnstine testified that as soon as he became owner of the note, and several times afterwards, he notified the trustee of the fact; also, that before the release Bigelow knew he held the note and came and received from him a memorandum of the exact amount due upon it.

4. The release was not recorded until more than a year after its execution and delivery.

5. The very day after Burnstine learned of the release, he filed his bill to assert his equities.

These essential differences in the two cases, and others that might be pointed out, considered in the light of the foregoing points and the one that will follow, destroy all pretension that the decision in the Burnstine case is a precedent for this one.

IV.

Staleness and Acquiescence.

No rule is better settled in this court than that laches and acquiescence are a bar to any relief in such a case as the present.

The language of this court in Badger *vs.* Badger (2 Wall., 95) is: "The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to the knowledge of the matter alleged in his bill; otherwise the Chancellor may justly refuse to consider his case."

The same doctrine was applied in Harwood *vs.* R.R. Co., (17 Wall., 79,) where the delay was five years; and again, in Marsh *vs.* Whitmore, (21 Wall., 178,) where it was ~~four~~ 12 years; and again, in Twin-Lick Oil Co. *vs.* Marbury, (91 U. S., 587,) where it was less than three.

In Hayward *vs.* Nat'l B'k, (96 U. S., 618,) Mr. Justice Harlan, delivering the opinion of the court, said: "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced.

"These doctrines have received the approval of the court in numerous cases. (Twin-Lick Oil Co. *vs.* Marbury, 91 U. S., 587; Badger *vs.* Badger, 2 Wall., 87; Marsh *vs.* Whitmore, 21 Wall., 178; Harwood *vs.* R.R. Co., 17 Wall., 79.) In the last-named case this court said that, without reference to any statute of limitations, equity has adopted the principle that the delay which will defeat a recovery must depend

upon the particular circumstances of the case. The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, *or where the rights and liabilities of others have been in the meantime varied.* If the property is of a speculative or precarious nature, it is the duty of the man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, and prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage."

To the same effect see Godden *vs.* Kimmell, 99 U. S., 211, and Brown *vs.* Co. Buena Vista, 95 U. S., 161.

In Sullivan *vs.* R. R Co., 94 U. S. 811, Mr. Justice Swayne, delivering the opinion of the court, says: "To let in a defence that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation should be laid by any averments in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for a court to apply the inherent principles of its own system of jurisprudence and to decide accordingly."

Apply these principles to the present case. The release was acknowledged by Ward October 9, 1872, and recorded

October 14, 1872. The bill of the appellee was filed August 9, 1875, and the first notice to or step taken against the appellant was by the amendment filed August 22, 1876. Thus very nearly four years intervened. What explanation does the appellee offer in his bill for not bringing forward his claim earlier? Not one word. Neither does he offer any in his evidence. The evidence of Kilbourn shows that the appellee went to the City Hall and complained to Ward of the release. That was in 1873. (R., 21.) How long had the appllee known of the release before that interview? This nowhere appears.

But the element of time is secondary when considered in connection with that of acquiescence. It is demonstrable that the appellee did acquiesce in the situation, and had every reason to acquiesce in it. Indeed, he does not himself deny such acquiescence.

The debt evidenced by the notes, held as was supposed by Aistrop & Dudley, was, together with other moneys due that firm by Mayhew at the time of the release, secured by seven deeds of trust, each for $1,000, on seven of the front lots. (Bigelow's dep., R., 23, f. 75.) These deeds were recorded Oct. 14, 1872, (R., 92, 96,) the very day when the release was recorded. Bigelow swears that these deeds and the release were parts of the same arrangement. These deeds were next after the appellant's deeds of trust. The value of the front lots and improvements at that time is shown to have been abundantly sufficient to secure as well the debt of the appellant as that of Aistrop & Dudley.

It will be borne in mind that the period in question antedated, by a year, the panic of 1873.

Again, after the release of the front lots by Ward, the Aistrop & Dudley notes were secured by the Ward deed of trust in respect of the rear lots, and the note held by Van Riswick having been paid, all of that security attached to

those two notes. One note secured by the Blackfan deed of trust had also been paid. It is impossible that the value of the rear lots was not largely in excess of the note purchased by the Arlington Fire Insurance Company. The estimate of the appellee himself is that these rear lots were worth thirty cents a foot, and that Mr. Dudley valued them as high as fifty cents. (R., 34, f. 112.) At thirty cents they were worth about $6,000, and at fifty cents about $10,000. As things stood when the release was made, and until the panic of 1873, the appellee held abundant security. Besides, it is apparent that the appellee was on friendly terms with Aistrop & Dudley, who had acted as his broker in several real-estate transactions, and, it may well be inferred, was unwilling to expose the misconduct of the latter.

Again, in addition to the property, there was the personal responsibility of Coburn and Aistrop & Dudley. There is no satisfactory evidence that they were insolvent.

Now, it is asked, whether any one can doubt that the appellee, considering himself secure, accepted the situation produced by the misrepresentations of Dudley? He himself says (R., 36, f. 117) that after the release "he did not feel quite sure of payment," and that is all he can say. Is it not apparent that the appellee, instead of acting promptly, determined to take the chances of the future; and having made that determination, will this court now give him relief? And especially should such relief be denied in a case where the original bill assumed that the appellee had lost his security in respect to the front lots, and hence sought to drive the Arlington Fire Insurance Company to that security, and thereby to reserve the rear lots for the benefit of the appellee, and where the filing of the amended bill against the appellant was manifestly an after-thought.

What has been the effect of the negligent conduct of the appellee upon the appellant, assuming that the latter was ever bound?

It will be observed that there is no pretence that the appellant had actual notice. The only pretence is, that the appellant is bound by implied notice. The bill does not charge Ward with fraud or collusion. It simply avers that without authority he released the deed of trust. The loss sustained by the appellee is attributable solely to his own neglect. He gave no notice to Ward of the transfer to him of the two notes as collateral. Had such notice been given, the release would not have been made. He brought upon himself the loss of which he complains, by a failure to give notice.

He is in precisely the situation of an assignee of a mortgagee who fails to give notice to the mortgagor, and who is bound by payments made to the mortgagee or a release or entry of satisfaction of the mortgage.

Jones on Mortgages, §§ 791, 820, 831, 956.
Bank of Indiana *vs.* Anderson, 14 Iowa, 544.
Horstman *vs.* Gerker, 49 Pa. St., 282.

As the appellee gave no notice to Ward, so also upon the discovery of the release he gave none to the appellant.

If Bigelow was the agent of the appellant and neglected his duty as such, the appellant was entitled to its action, but that right of action has been lost by lapse of time. It is now barred by the statute of limitations,—three years in this District. Besides, the appellant, duly notified, had a right to pay the debt of the appellee and to be subrogated to all the securities held by him. But these securities, in consequence of the lapse of time, have become barred and valueless. The note of Aistrop & Dudley, which appellee held, was barred before the appellant was made a party.

In addition to the above attention is called to the changes in the title to the property and the expenditures by the appellant for improvements. It very seldom happens that a

case more fully illustrating the doctrine of equity in respect of laches and acquiescence is presented than the present.

The proposition involved in the decree is briefly this: that a party who conceives that he holds a claim for a constructive trust against another, not actually in fault, and with remedies over, may fail to notify such other party, and after acquiescence in the situation as long as it affords favorable prospects, may then change his mind and bring suit after, by delay, all remedy over has been barred.

W. D. DAVIDGE,
S. R. BOND,
Counsel of Appellant.

FILED
OCT 21 1880
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

No. 171.—October Term, 1880.

THE CONNECTICUT GENERAL LIFE INSURANCE COMPANY, Appellant,

vs.

CHARLES A. ELDREDGE, Appellee.

BRIEF FOR APPELLEE.

ENOCH TOTTEN,

Counsel for Appellee.

J. L. Pearson, Printer, 9th and D sts., Washington.

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The parties defendant to the original bill were George B. Coburn, William H. Ward, Edward P. Aistrop, Henry H. Dudley, Joseph H. Blackfan, Joseph H. Blackford, John C. Ten Eyck, Joseph H. Burr, and the Arlington

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Fire Insurance Company. The defendants Coburn, Wood, Blackfan, and the Arlington Insurance Company, answered. Subsequently, the complainant, by leave of the court (15), amended his bill by making the present appellant a party defendant, and an answer was soon afterward filed by it. —(16.)

Testimony was taken in the cause, and on the hearing at special term, the court passed a decree (107) declaring the deed of release null and void, and appointing a trustee to make sale of the property involved in the cause, unless payment of the amount due upon the notes, and costs, should be made within a specified time. From this decree the appellant appealed to the court in general term, which latter court affirmed the decree, and the cause was then brought here by the appellant.

From the pleadings and proofs in the case, the following facts appear:

Statement of Facts.

The defendants Henry H. Dudley and Edward P. Aistrop borrowed $4,000 from the complainant and gave their note therefor, dated on the 15th day of June, 1872, payable sixty days therefrom, signed by their firm-name of "Aistrop and Dudley."—(20, 32, 94.)

On the same day Aistrop and Dudley delivered to the complainant, as security for the payment of the loan, two promissory notes, made by the defendant George B. Coburn, to the order of John Van Riswick, and duly endorsed by him, but "without recourse."—(32, 33.) These two notes bore date of the day they were made, the 10th day of November, 1871, and were each for the sum of $2,578.13, payable, one of them, in two years, and the other in three years, after date, with interest at the rate of seven per centum per annum.—(20.)

These notes, with one other note of the same amount, given at the same time and executed in the same way, were for purchase-money and were secured by a deed of

trust, duly executed by said Coburn to the defendant William H. Ward, as trustee, upon sixteen lots, eight of which were on Fourteenth street and eight in the rear of them, and fronting on a cross street, in the city of Washington.—(29, 38.)

The sum mentioned in the deed as secured thereby, was $7,734.40, and was the balance of unpaid purchase-money on the same property.

One of the three notes secured by the deed, that which first became payable, was retained by the payee and beneficiary under the trust deed, Van Riswick, and was owned by him at the time of the complainant's loan.—(3.)

There was, at the same time, of record, another and prior deed of trust, executed by defendant Dudley, who had previously owned the same lots, to one Joseph H. Blackford, in the sum of $7,000, to secure two notes to defendants Ten Eyck and Burr, of $3,500 each, which notes were payable in one and two years, with interest at seven per centum, and which deed and notes bore date of the 17th of August, 1871.—(5, 1.)

On the 8th day of February, 1872, defendant Coburn conveyed the said lots to one Edwin E. Mayhew, subject to the deed of trust above mentioned.—(2, 16, 30.)

Each of the eight front lots on Fourteenth street was improved by a three-story pressed-brick house, in a forward state of completion at the time the complainant made the loan, and were each worth from five to eight thousand dollars in their then condition.—(24, 61.)

On the 8th day of February, 1872, the property in question was sold and conveyed to one Mayhew, (96,) and on the 28th of that month Mayhew subdivided the property.—(See diagram, 38.) On the 1st day of October, 1872, Mayhew applied to the appellant, through J. G. Bigelow, its agent in Washington, (70, 71, 42, 22, 23, 47,) for a loan on the property (67); and accordingly a loan of $32,000.00 was made by the appellant to Mayhew, which was concluded about the 11th of October, 1872, (54, 96, 63,)

and was secured by eight deeds of trust, one on each of the houses and lots fronting on Fourteenth street, and each deed secured $4,000.00.—(18, 38, 96.)

In order to consummate this transaction it was necessary that the then existing incumbrances should be discharged. The incumbrance of $7,000.00, secured by the trust deed from Dudley to Blackford (39), and the trust made by Coburn to Ward (39), to secure the sum of $7,734.40, represented by three notes of $2,578.13 each, two of which are the subject-matter of the controversy here, were existing liens on the property.

Bigelow was instructed to see to it that the security of the appellant should be the first lien upon the property, (22, 25, 26, 42, 70, 71,) and he set about procuring the discharge of the then outstanding incumbrances.—(22, 23.)

By direction of the officers of the insurance company, the appellant, Bigelow employed William H. Ward, who was the trustee in the trust deed made by Coburn to secure the payment of the three notes payable to Van Riswick, to investigate and report upon the title to the property.—(25, 26, 43, 47, 70, 71.)

During the performance of this service, and to free the property from the Coburn trust, Ward executed and delivered the fraudulent release complained of in the bill in this case. By this release an attempt was made to discharge all the lots, fronting on Fourteenth street, from the operation of the deed of trust.—(12, 29, 38.)

The same lots were, at the same time, released from the operation of the trust deed to Blackford, by a deed of release made by one Blackfan; the validity of this release is assailed, as is also the validity of the sale subsequently made by Blackfan, to the Arlington Insurance Company, of the lots fronting on U street. But if the view of the court below, that the appellant is responsible for the acts of its agents, shall be approved here, this branch of the case becomes unimportant.

The complainant before this time had gone to his home in Wisconsin, and the defendants Aistrop & Dudley were rapidly approaching, if they had not already reached, bankruptcy. The note for the $4,000 loan had become due, and the enforcement of its payment delayed, on the faith of the security afforded by the two notes and the deed of trust to the defendant Ward.

All the claims and liens on the property were paid up except the notes of the complainant. He was absent and, therefore, selected as the victim. Dudley knew the notes were left with Messrs. Kilbourn & Latta for collection.—(32, 33.)

Aistrop, or Aistrop and Dudley together, negotiated the release of the front lots from "the Blackford" deed of trust, and the sale of the remaining note for $3,500 to the defendant the Arlington Insurance Co.—(22, 23.) Aistrop and Dudley's consent is signed to the release of the front lots (30), designating themselves as the holders of the two notes which they had long previously transferred to the complainant, and when they were, in fact, owned held by the complainant.—(32, 33.)

Dudley, when inquired of by Bigelow, as agent of the Connecticut Life Insurance Company, about those two notes, told him they were where he, or he and Aistrop, could get them, and told him that Totten or some one else then held them.—(25, 48, 49.) Dudley at the same time told Bigelow that if the holder had any "*claim upon the notes he could satisfy it.*" "*He could make it all right with Ward.*" Aistrop & Dudley did "make it all right with Ward," so as to get his release without the payment or production of the notes, and without any evidence of their being the holders; they delivered it to Bigelow, (23, 25,) the agent of the defendant, the Connecticut General Life Insurance Company, and Bigelow sent it to the president of the company.—(44, 47, 26.) And Bigelow swears that he made out seven deeds of trust, one on each of seven of the lots released by Ward, to Mr. Totten to secure seven

one thousand dollar notes executed by Mayhew to Aistrop and Dudley. And he swears that it was all one transaction from the beginning of the negotiation of the loan to Mayhew, including all the releases upon the lots, the delivery of the same and the negotiation of the sale of one of the $3,500 Ten Eyck and Burr notes to the defendant the Arlington Insurance Company.—(See Bigelow's testimony.) Dudley also says (94) that the object of the release by Ward was to enable Mayhew to get money to complete the houses. And finally, it appears from the application for the loan which Mayhew made (69) to the defendant the Connecticut General Life Insurance Company, which was put in evidence by that defendant, that both the defendants Aistrop and Dudley made oath on the 2d day of October, 1872, to the truthfulness of Mayhew's statements and description, and the value of the lots. And both swore that the eight lots and houses were then worth the sum of $67,800. This value was sworn to before any of the money borrowed of the Connecticut General Life Insurance Company had been expended upon them. This statement, too, is in the handwriting of Bigelow, the agent.—(42.) When, therefore, so large an amount was to be released from the security, both common prudence and common honesty required this agent to see to it that neither equitable nor legal rights were taken away. Bigelow, however, frankly declares, "*I cared nothing about the assent of the party secured; I simply wanted a release of the legal title by the trustee.*"—(26.)

Ward, in his answer, substantially admits the charges against him. But his answer is peculiar. He denies that he ever accepted the trust. He admits that when he was convinced he was trustee he executed the release. He denies he was under any obligation to the complainant, but alleges he used due diligence, as trustee, in executing the release. He denies that the complainant had any interest in the notes, which he made worthless by his re-

lease, and attempts to make it appear, at the same time, that defendant Dudley was the agent of the complainant, in his absence, and was empowered to authorize him as trustee to make the release on the complainant's authority. He sets up a custom of brokers to authorize the release by trustees of securities of their principals, at the same time pretends not to know that the complainant had or pretended to have any interest in the notes. He denies that complainant is damaged at all, when he knew from the records, and from the abstract of title which he himself made, that the effect of his release was to take from $40,000 to $60,000 of complainant's security away and leave his debt unsecured except by a deed of trust on the back lots, with a prior incumbrance upon them of as much as, or more than, their value. He puts Dudley upon the stand but asks him no question with reference to the custom of brokers, although Dudley is a broker. He does not seek even to show by him that he was acting as agent of complainant or had any authority to act as his agent in this transaction. He did not attempt to prove by him, or any one, that he made a single inquiry with reference to the whereabouts of the notes. He answers that he knew Van Riswick to be a good, responsible, reliable man. The three notes ran to Van Riswick. Van Riswick produced his note as evidence of his authority to authorize the release, and as the holder of that note and that only, signed the release itself. He does not, in his answer, eulogize Aistrop and Dudley as he does Van Riswick, and yet he is satisfied with their mere signature "as holders of the second and third notes," without the production of the notes or any evidence whatever as to their payment or as to who held them. It is in proof that Ward told the complainant, when called on by him, and inquired of him, as to his execution of the release and the circumstances, that he said Van Riswick did produce his note at the time of the release, and that Aistrop and Dudley did not produce the others.—(21, 34.)

THE PARTICIPATION OF THE APPELLANT IN PROCURING THE FRAUDULENT RELEASE, AND THE AGENCY OF BIGELOW AND WARD.

The company sent a blank form of application for a loan to Bigelow for the signature of Mayhew.—(56.)

Bigelow testified as follows: "In the fall of 1872, I was engaged principally in loaning money upon real estate in the city of Washington. I was agent for the Connecticut General Life Insurance Company. I loaned for this company $32,000 on lots 50 and 59 to 65 inclusive, in square 204, the property in question." "I loaned the money to Edwin E. Mayhew."—(22.)

Again Mr. Bigelow swears: "The fact is that was my business, to have the 14th-street lots released to give me the first lien on the property; and I was acting for the Conneticut General Life Insurance Company."—(23.)

"Mr. William H. Ward was employed by me upon the instruction of the Connecticut General Life Insurance Company to make the abstracts of the title to all the property upon which the company made loans. . . . He was employed to make the abstract in this case."—(25.)

"I don't recollect that I ever stated to Mr. Ward that I was directed to employ him and nobody else, *but that was the fact, he was to make this abstract.*"—(26.)

"I cared nothing about the consent of the party secured—I simply wanted a release of the legal title by the trustee." Equitable rights were intentionally disregarded by these honest people. Bigelow, on his examination by the counsel for the defendant, being pressed to decide as to whose agent he was in employing Ward to make the abstract, says that Mayhew had no election, he was to pay all the expenses, but *Ward was to be the man.*—(43.) "The company reserved to itself the right of selecting their attorney."

Bigelow, on being pressed still further, by the counsel for the Connecticut General Life Insurance Company, as to

his knowledge and suspicions as to who held the two notes of complainant, said he had no doubt as to who was the holder of them, but that it was a matter he had explained in his examination-in-chief. The trustee in the deed of trust securing these notes was Ward, who sustained the peculiar relation to the transaction, of furnishing the abstract. It was taken on his faith in him and his employment; he gave himself no concern about it.—(45.)

Bigelow acted as agent for the Connecticut General Life Insurance Company in the distribution of the money loaned in its application to the discharge of the liens upon the security. He was to see that all liens were discharged.—(22, 25, 26, 70, 71.)

In borrowing this money, in addition to interest, Mayhew was required to furnish and did furnish applications for about forty thousand dollars of life insurance for this defendant, and all these policies were issued with a reference to Bigelow as agent of this company. Mayhew paid the premiums.—(47, 48, 59.)

Bigelow says, that while he was informed by Aistrop and Dudley that they were the owners of the two notes referred to, they did not represent that they had the present possession, but informed him where they were, and he thinks designated Totten as the custodian. On being recalled, Bigelow swears that the representation that they, the notes, were in the hands of a third party was made a day or two before the Ward release was made. It was made on Bigelow's inquiry as to where the notes were. He wanted to see them.—(48, 49.)

He did not, however, call on Totten to ascertain if he held the notes and by what claim. It was enough that Dudley could make it all right with Ward. The question was put to Bigelow by defendants, the Connecticut General Life Insurance Company, as follows: "Upon the release being executed and delivered to you, did you believe or suppose that the notes had been produced to the trustee in the release?" He answers, "that because of the pe-

culiar relation of Ward to the transaction, he did not attempt to exercise any supervision over his acts and took it for granted that it had been properly done."—(48.)

On a further inquiry, in reply to a question of complainant's counsel, Bigelow says, the language of Dudley he cannot give, but the impression left at the time was, that if the present holder had any claim on the notes, he, Dudley, could satisfy it, and would do so, and remarked, "I will make it all right with Ward, the trustee." "It was that remark that led me to suspect that the party who had the notes might have had some claim upon them."—(49.) Indeed, it might naturally lead to that conclusion as well as suspicion. *But he did suspect*, and he made the loan with the suspicion that somebody held the two notes for a valuable consideration. But then Ward, another agent of the insurance company, whose peculiar relations relieved Bigelow, made the abstract, and they only cared for "legal rights."

There can be no doubt that Bigelow was the agent of the defendant, the Connecticut General Life Insurance Company, on his own testimony; but if any doubt existed, it is put beyond question by the letter of E. H. Parsons, president, to J. G. Bigelow, under date of September 28th, 1872.—(70.) "As to Ward, examiner, we want the best, the selection we shall leave to you. Your laws or forms differ from ours in many respects and I am not posted in them. *I must, therefore, depend upon you to see that every point connected with the real estate and drawing papers, &c., &c., is fully covered.*" And although Parsons undertakes, in his deposition, to deny that Bigelow was the agent of the company, yet he admits that Bigelow obtained a large number of life insurance applications for the company before this loan was completed, and that he, Bigelow, was authorized to sign the receipts for the premiums.—(59.) He also uses the following peculiar language: "I believed, upon Webster's statement, the company could rely upon Mayhew, and representations made by Bigelow and he was

competent to attend to the matter as it should be, but never intended he or any other person in Washington should *finally decide*, as the company's agent or attorney, upon the *validity of the title* of the security to be given for the loan, or the *complete fulfillment* of Mayhew's promises and representations. That was to be done when the papers were received here."—(59.) Webster was one of the directors of the insurance company.

There is another controlling fact on this subject. The money was all paid by the company to Mayhew through Bigelow; the latter drew drafts at various times on the appellant, and signed them as "agent."—(75.) Bigelow says this word meant that he was agent for Mayhew in so signing. It may be difficult for ordinary persons to understand why Mayhew's own "agent" should sign a draft for him as "agent," and make it payable to the order of his principal. It would have been more in accordance with the usual and direct manner of transacting business if Mayhew had signed his own drafts. The truth probably is that the company would have refused to honor drafts drawn by any other than Bigelow, upon whom the company's officers depended for safety.—(61.) The last draft was actually drawn by Bigelow in Hartford, and probably in the office of the company, and was made payable to Mayhew's order and sent to him.—(42, 77.) The money was entrusted to Bigelow by the company, who undertook to see to its proper application. Bigelow says (46), "in the distribution of money, and seeing that it was properly applied to paying off liens on the property, I acted more as agent for the company, *as its interests were paramount*."—(46.)

The release made by Ward to Coburn was sent to the office of the insurance company in Hartford by Bigelow, who had received it from Dudley; a copy of it is attached to the deposition of Parsons.—(77.) The release itself shows that it was consented to by two *strangers to the deed of trust which it releases*. There is and was enough on the face of

this release to put any person, desiring to act honestly, upon inquiry as to whether the persons so consenting were the real holders and owners of the notes. If a person may act upon this release, and thus deprive an innocent holder of security, then any person who is villain enough to sign his name, as holder, may procure the discharge of any deed of trust in the land. There is absolutely no protection. If the trustee may take the word of one man, he may of any man; and if a purchaser may consider it a safe record to purchase upon, when the only evidence of release, or the right of release, is the consent of strangers to the deed released, and that, too, before the maturity of the notes, then the system of land records is only a ready and safe means of perpetrating fraud.

Argument and Authorities.

Neither one of the three notes secured by this deed of trust was due at the date of the release. The first note fell due November 10, 1872, and the release bears date October 9, 1872.

There is a most extraordinary similarity between this case and the case of Burnstine vs. Ormes.—(Decisions Oct. Term, 1877, No. 240.) The fraudulent release in each case was made and delivered by the same trustee, and to the same insurance company. In the present case Ward made the deed on the 28th day of September, 1872, and in that case, only about four months afterwards, on the 4th day of February, 1873. Bigelow was the agent of the insurance company in both transactions, and received the fraudulent deed in each case and sent it to the company. The cases differ in this: Ormes, the original payee of the note, falsely represented himself in that case as the holder of the note, and in this case Dudley, an utter stranger, acted that part. In that case Ward was passive, while in this he was active; he was active not only in the capacity of trustee, but in the other capacity of attorney for the insurance company. In both cases the in-

nocent victim was reposing in fancied security, without notice or any ground of suspicion of the fraud these men were engaged in perpetrating upon his rights. This court in that case used language which is very appropriate here. The opinion says:

"This release and discharge of the trust deed was made by Ward, the trustee, and Ormes, the original payee of the $3,000 note, but it was in disregard and in fraud of the rights of Burnstine, to whom the note had been transferred before maturity, with the accompanying security of the trust deed, and who was the actual holder thereof.

"The company claims that under these circumstances it became the first encumbrancer, and having subsequently purchased the property at the sale under the trust in good faith and without notice, it acquired the legal title and holds the same discharged of Burnstine's claim.

"Without seriously contesting the soundness of the general principle of law set forth, the counsel of Burnstine contends that John G. Bigelow was the agent of the company in making its loan to Hubbard, and in making the subsequent payment to him, and in receiving the release. That Bigelow knew that Burnstine was the holder and owner of the note secured by the deed of trust to Ormes, and knew that the execution of the release by Ward and Ormes was a fraud upon Burnstine.

* * * * * *

"The question is one of fact—Was Bigelow the agent of the company in receiving the release, and had he knowledge of the fraud?

"The fraudulent release was executed on the 4th day of February, 1873, and on or about that day was delivered to Mr. Bigelow. It was retained by him without being placed on record until November, 1873, when he delivered it to Mr. Parsons, the president of the insurance company. Mr. Parsons retained it until the 7th day of February following, (for the reasons given by him,) when he placed it on record.

"We think that upon the evidence it is too plain for discussion that in February, 1873, and afterwards, Bigelow was the agent of the insurance company in disbursing its moneys to Hubbard and others and in perfecting its title to the lots covered by the larger trust deed, and in

paying out the money reserved for the indemnity of the Ormes or Burnstine security, and that he received the release in question for and on behalf of the company, held it in that capacity, and at a convenient time delivered it to its president as a muniment of title.

"Whether Mr. Bigelow had knowledge that Burnstine was the owner of the $3,000 note when this release was executed, and that Ward and Ormes had no authority to execute the release they delivered to him, is not free from doubt. Mr. Bigelow testifies positively that he had no such knowledge. Mr. Burnstine testifies positively that he had such knowledge, and that in the presence of his brother (now deceased) and himself Mr. Bigelow saw him take the note and trust deed from his safe as his property, that they were examined, a calculation made by him of the amount due on the note, and the securities again placed in Burnstine's safe.

"Mr. Ormes testifies that he informed Mr. Bigelow that Burnstine was the owner of the note or had an interest in it, and that he went with him to Burnstine's office, leaving him at the door, which Bigelow entered, while he passed on.

"Mr. Bigelow admits that he was informed by Mr. Ormes that Burnstine held the note as collateral security, and testifies that he called upon Burnstine for the purpose of paying his claim, but that both Burnstine and his brother denied the ownership or possession of the note, or any knowledge whatsoever of the note or the security.

"The court below gave its decision in favor of Burnstine, and we do not see that the evidence is so clearly against that decision that we should be justified in reversing it.

"Adding to this the fact that a man who was honest and but reasonably prudent *should not have been satisfied with a release without the production of the note secured, when he had information that there was question about its ownership*, we feel constrained to affirm the decree."

(This case was not reported.)

A comparison between the dates in the Burnstine and the present case is significant when considered in connection with the other significant fact that Bigelow, Ward, and the appellant all appear in both transactions.

The application for the Mayhew loan was made Oct. 1, 1872, and the application for the loan in the Burnstine case was made Oct. 29, 1872. Bigelow in each case drew the drafts on the company for the money as "agent."

The release in this case was made Oct. 11, 1872, while in that case the release was not made until Feb. 4, 1873, or about four months after the application for the loan. Bigelow was appointed general agent to solicit applications for insurance, &c., &c., for the company, Nov. 22, 1872; this is a fact, though not an important one, common to both cases. There was a conflict of testimony in the Burnstine case about the question of notice to Bigelow advising him that the note was held by Burnstine and not by the beneficiary named in the trust deed. Here there is no dispute on that point. Van Riswick, the payee of all the notes, appeared and signed the release as holder of one only of the notes; Aistrop and Dudley signed the release as the holder of the other two notes. Bigelow knew at that time,—he had been told by Aistrop and Dudley, that the two notes were not in their possession, and they also told him this fact in such a way as to leave the impression on his mind that the actual holder had a lien of some kind upon them. In the Burnstine case the note was over-due; in this case not even the first of the three notes was due at the time of the fraudulent release. In the Burnstine case, before the fraudulent release was made, Bigelow had been appointed general agent to solicit applications for life insurance, &c., &c.; in this case the appointment (the indentical paper found in the Burnstine case) was made afterwards; but the officers of the company in this case, before the release was made, had sent the necessary blanks, instructions, &c., &c., for that purpose, and had authorized Bigelow to receive and forward applications for policies; and he actually did send to the company applications for life insurance to the amount of about $40,000.00, (47, 48,) and the policies were issued with Bigelow's name appearing upon them, as agent of the company.

It is submitted, in the language of this court in the Burnstine case, that upon the evidence it is too plain for discussion, that on the 9th of Oct., 1872, and afterwards, "Bigelow was the agent of the insurance company in disbursing its money" to Mayhew and others, and in "perfecting its title to the lots, . . . and that he received the release in question for and on behalf of the company."

Ward, in his answer, denies that he accepted the trust confided to him by the deed in question, but admits that he executed and delivered the fraudulent release. This act precludes him from denying that he accepted the trust. It is not necessary that a trustee should signify his acceptance of the trust in a formal manner. Acceptance or assent may be by words or acts.—(Scull vs. Reeves, 12 Green Ch., 84; Leffler vs. Armstrong, 4 Iowa, 482; Skipworth vs. Cunningham, 8 Leigh, 271; Spencer vs. Ford, 1 Rob. (Va.), 648; Pope vs. Branden, 2 Stew. (Al.), 401; Hipp vs. Hutchett, 4 Texas, 20; Flint vs. Clinton Co., 12 N. H., 432; Hill on Trusts, 214.)

The duty of making a release, at the proper time, was one of the trusts mentioned in the deed. Bigelow was the special agent in this particular transaction, and Ward was the attorney employed by the company to make the examination of the land records relating to this particular property. Bigelow's relations to the company during the transactions in this case, were precisely the same as they were when the Burnstine trust was fraudulently released. Bigelow knew perfectly well that Dudley and Aistrop did not hold the notes at the time they undertook to discharge the plaintiff's security; Dudley told him so. But Bigelow says it was exclusively Ward's business to look after the title. Ward had the trust deed before him, and saw that the deed was made originally for the benefit of Van Riswick; Van Riswick, in writing, and on the release itself, disclaimed ownership except as to the first note, and that was paid. Dudley, who signed the firm-name of Aistrop &

Dudley to the release, did not produce for Ward's inspection and cancellation the notes they claimed to own, nor did Ward call upon him to do so, as he should have done. The plan was to get this release at all hazards. Ward, having been employed by the company to examine the records, and having done so, it will be presumed, even in the absence of proof, that he saw the deed of trust and knew its contents, and also that he knew that Aistrop & Dudley were strangers to it.—(Hodgson vs. Dean, 2 Sim. & S., 221; 2 Leading Cases in Equity, (pt. 1,) 144.) He undertook to discharge this trust, and, of course, knew all about it. He was acting as the attorney of the company at the time, and the company is, therefore, chargeable with notice of the contents of the deed, as well as of the very suspicious circumstances connected with its release.—(See Adam's Eq., 157, and note, for authorities.) Notice to the agent is notice to the principal, and the appellant is chargeable with notice in the same manner and to the extent as are Bigelow and Ward.—(2 Lead. Cases in Equity (pt. 1), pp. 134, 139, 144, 154, 157, 159, 160, 161, 178; Williamson vs. Brown, 15 N. Y., 359; Champlin vs. Loytin, 6 Paige, 189, 203; Burnstine vs. Ormes, 2 McArthur, 219. See Distilled Spirits, 11 Wall, 366; Kennedy vs. Green, 3 Milne & K., 699; Town of New Milford vs. Bank, 36 Conn., 93.)

A mortgagee with notice of the fraudulent discharge of a prior mortgage is not a *bona-fide* purchaser.—(Morgan vs. Chamberlain, 26 Barb., 163; Ely vs. Scofield, 35 Barb., 330; Jackson vs. Post, 15 Wend., 594.)

The English courts and American now apply the same rules in regard to notices under the registry acts as to all others. Under the registry acts, notice which puts the party upon inquiry, is sufficient.—(Williamson vs. Brown, 15th N. Y., 358; Norton vs. Eaton, 91 U. S., 720.)

In the case of Williamson vs. Brown, Judge Selden uses the following language: "That when the purchaser has knowledge of any fact sufficient to put him on inquiry

as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona-fide* purchaser." The rule being that the party in possession of certain information, will be chargeable with all the facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed.—(See, also, Cordova vs. Hood, 17 Wall., 1; Show vs. Spencer, 100 Mass., 382; Blaisdell vs. Stevens, 16 Vt., 179.)

The trust deed from Coburn to Ward authorized Ward, upon the "full" payment of the said notes, interest, costs, &c., "and not otherwise," to release and reconvey the real estate to Coburn.—(pp. 2 and 16.) The power of the trustee was, by this deed, specified and restricted. Ward assumed to release a *part* of the property, according to a description or subdivision entirely different from that in the trust deed; the deed authorized the trustee to release and reconvey the real estate described in it to Coburn on *full payment* of the notes. Had this trustee power to release on part payment? Did he possess power to release a *part* of the property on *part* payment? Are not purchasers bound to make inquiry before investing money in real property, where a deed of release appears in the chain of title discharging a *part* of the property, and according to a subdivision not in existence at the date of the trust, and that, too, before the maturity of the notes? Beyond the question of agency in this case, and putting out of sight the constructive participation in the fraud by the appellant, it would seem that there was enough appearing upon the face of this release to charge a *bona-fide* purchaser with notice.—(See Cameron vs. Irwin, 5 Hill, 272; Deyo vs. Van Valkenberg, Ibid., 242; Jackson vs. Morse, 18 John., 441; Ledyard vs. Chapin, 6 Porter, 320; Sherman vs. Sherman, 3 Porter, 337.)

The release in this case having been wrongfully made, and the company being chargeable with the notice of the fraud, through both its attorney in fact and its agent, the release was properly set aside and decreed to be null.—(Gordon vs. Mulhan, 13 Wis., 22; Williamson vs. Brown, 15 New York, 359; Boyd vs. Parker & Co., 43 Md., 182.)

Aistrop, Dudley, and Coburn are insolvent and, therefore, the plaintiff is without remedy on the promissory notes.

There are several other complications in the case growing out of the primary incumbrance upon the same property. The trust deed creating this incumbrance was made to one J. H. Blackford, and another person, J. H. Blackfan, undertook to release as to these front lots. One of the notes secured by this trust deed was sold to the Arlington Fire Insurance Company, and hence all these persons are made parties. An alteration was made in the office of the recorder of deeds in the record of the Blackford deed, in order to make it read Black*fan*, long after the deed had been recorded. But inasmuch as the decree cancels the fraudulent release, the only questions material now are those connected with the liability of the appellant's property to answer for the plaintiff's debt.

It is submitted that the decree from which this appeal was taken should be affirmed with costs.

ENOCH TOTTEN,
Counsel for Appellee.